83-5533

No. 83-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THOMAS GERALD LANEY,

PETITIONER,

vs.

STATE OF TENNESSEE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT

OF TENNESSEE

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QUESTIONS PRESENTED

1. Whether the trial Court's exclusion for cause of a potential juror who expressed a general and ambiguous objection to the death penalty violated the petitioner/defendant's constitutional protections established by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

2. Whether Tennessee Code Annotated, §39-2404, violates the constitutional protections established by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution by allowing the prosecution to use as an "aggravating circumstance" in a charge of felony murder the fact that the murder "was committed while the defendant was engaged in committing...any first degree murder, arson, rape, robbery, burglary..." [T.C.A. §39-2404(i)(7)]

3. Whether Tennessee Code Annotated, §39-2404 (g), which creates an impermissible presumption of death and unlawful shift in the burden of proof to the defendant when one or more aggravating circumstances are proved, is a violation of the constitutional protections afforded by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

4. Whether the trial Court's instruction to the jury as to all eleven aggravating circumstances and further instruction to the jury that they could find any or all of those aggravating circumstances, when the majority of the aggravating circumstances were neither advanced nor argued by the State, violated the petitioner/defendant's constitutional protections established by the Eighth and Fourteenth Amendments to the United States Constitution.

5. Whether the infliction of the death penalty under the facts and circumstances of the instant case constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

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TABLE OF AUTHORITIES

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Petitioner Thomas Gerald Laney respectfully prays that a writ of certiorari issue to review the Judgment of the Supreme Court of Tennessee.

CITATION TO OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Tennessee are reported at 654 S.W.2d 383 (Tenn. 1983) and are attached hereto as Appendix A.

JURISDICTION

The Judgment of the Supreme Court of Tennessee was entered on June 27, 1983. A timely petition to rehear was denied on August 1, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(3), petitioner having asserted below and is asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth Amendment to the Constitution of the United States, which provides in

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relevant part:

> "No person shall be held to answer for a capital crime...nor be deprived of life, liberty,...without due process of law."

and the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to...trial, by an impartial jury of the State..."

and the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "Excessive bail shall not be imposed, nor cruel and unusual punishment inflicted."

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any state deprive any person of life, liberty or property, without due process of law..."

2. This case also involves the Tennessee statute which provides for possible death penalty on conviction of murder in the first degree. The statute is codified in Tennessee Code Annotated, §39-2404 (now §39-2-203), a copy of which is attached hereto as Appendix B.

STATEMENT OF THE CASE

On December 11, 1980, petitioner Thomas Gerald Laney was indicted by the Sullivan County, Tennessee, Grand Jury for the first degree murder (felony murder) of Suleiman "Sam" Showkeir that occurred on October 16, 1980. On January 9, 1981, the defendant appeared with his attorney and was arraigned. Upon motion of the defendant for psychiatric evaluation, the trial judge ordered the defendant sent to Bristol Regional Mental Health Center for evaluation of his competency to stand trial and sanity at the time of the offense. On January 26, 1981, a letter from the Bristol Regional Mental Health Center, in which that center found the defendant to be competent to stand trial and found no sign of any major psychiatric disorder which would have prevented the defendant from adhering to the requirements of the law, was filed with the Court. On March 2, 1981, the Sullivan County Grand Jury presented the petitioner for first degree murder (felony murder) and he was arraigned on this resubmitted indictment on March 5, 1981.

Petitioner's trial before a jury commenced on his plea of not guilty on April 8, 1981, continued through and was completed on April 10, 1981. The jury found the petitioner guilty of first degree murder. On April 11, 1981, the jury, after hearing the evidence presented on aggravating and mitigating circumstances, and duly deliberating, fixed the defendant's punishment at death. The jury unanimously found the statutory aggravating circumstance contained in Tennessee Code Annotated, §39-2404 (i)(7), which reads as follows:

> "The murder was committed while the defendant was engaged in committing or was an accomplice in the commission of or was attempting to commit or was fleeing

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after committing or attempting to commit any first degree murder, arson, rape, robbery burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb."

The jury unanimously found that there were no mitigating circumstances sufficiently substantial to outweigh this statutory aggravating circumstance.

STATEMENT OF THE FACTS

Douglas Harris testified he was employed by the Kingsport Police Department and that on the evening of October 16, 1980, he was called to the home of Suleiman "Sam" Showkeir; that when he arrived at the scene there were other officers already present; he testified concerning the general description of Mr. Showkeir's home and the area surrounding that residence.

David Wood testified that Mrs. Showkeir came to a nearby market where he was visiting an employee, and that he and the employee returned with her to the Showkeir home where they found that Mr. Showkeir had been shot but had managed to get inside the house, and they further observed an individual with a mask on, lying in a puddle of blood on the carport, with a gun in his hand.

Robert Moore testified he was a Captain with the Kingsport Police Department; that he went to Holston Valley Community Hospital on the 23rd day of October, 1980, to interview the defendant, Thomas Gerald Laney; and that Laney gave him an oral statement in which he admitted having drunk several beers in Johnson City, Tennessee, then driving to and around Kingsport for a few minutes; Moore testified that Laney told him he didn't remember anything else that happened or where he went next, but did admit to owning a .38 caliber Colt Cobra.

Roger Goldsberry testified he was a Special Agent of the Federal Bureau of Investigation and was assigned as

an examiner in the firearms unit of the F.B.I. Laboratory. He testified that bullets found in Mr. Showkeir and at the residence were consistent in some respects with the bullets he test fired from the .38 caliber Colt Cobra, recovered from the scene.

Dr. Cleland C. Blake testified that he is a board-certified forensic pathologist; that he performed an autopsy on Mr. Schowkeir; and that the cause of death was from internal bleeding.

Joann Christian testified she was the Assistant Director of Medical Records at Holston Valley Community Hospital; that according to Mr. Laney's hospital record a test for blood alcohol revealed a level of 155.

Dr. Cleland C. Blake testified from the hospital record introduced earlier and explained that the figure of 155 on the record shows that the defendant had a blood alcohol level of approximately .15 and that this could create a range of reaction in an individual from an affect that is barely discernible to almost a stupor.

The jury returned a verdict of guilty of murder in the first degree.

The sentencing phase of the trial began on April 11, 1981. The State relied upon the evidence previously presented.

Donald Jones testified he was a Professor of Psychology at East Tennessee State University; that he examined and administered intelligence quotient tests to the defendant; that he obtained an overall I.Q. of seventy-two (72) which would place him in a borderline mentally retarded range.

Shirley Laney Barwick, the defendant's oldest sister, testified that the defendant was a "follower", that he had difficulty in school, and that he left school while

in junior high.

Dr. Wendell Skinner testified the defendant had been shot four times: behind the ear, in the right arm, in the left leg, and in the right buttock.

The jury unanimously found that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance found by the jury, and the jury unanimously found that the punishment for the defendant should be death.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner's first ground for error in the Tennessee Supreme Court asserted that the trial Court charged the jury that they could find as the sole aggravating circumstance in a felony murder situation the aggravating circumstance contained in Tennessee Code Annotated §39-2404(i)(7), now Tennessee Code Annotated §39-2-203. The Tennessee Court rejected this argument and refused to overturn its holding in an earlier case. 654 S.W.2d at 387.

2. Petitioner argued that the trial Court erred in charging the jury over the objections of the defendant that they could find any of eleven (11) aggravating circumstances or any of eight (8) mitigating circumstances even though the majority of these were not supported by the proof nor advanced by the respective parties. The State conceded that the instructions were improper, but the Court held they did not prejudice the defendant's trial. 654 S.W.2d at 388.

3. Petitioner argued that the infliction of the death penalty in the instant case constitutes cruel and unusual punishment. The Tennessee Court rejected this contention. 654 S.W.2d at 389

REASONS FOR GRANTING THE WRIT

I. THE TRIAL COURT'S EXCLUSION FOR CAUSE OF A

POTENTIAL JUROR WHO EXPRESSED A GENERAL AND AMBIGUOUS OBJECTION TO THE DEATH PENALTY VIOLATED THE CONSTITUTIONAL PROTECTIONS ESTABLISHED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The standard developed by this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968), rehearing denied, 393 U.S. 898 (1968), and subsequent cases for excluding prospective jurors who oppose the death penalty is a very strict one: only jurors who are unequivocably opposed to the imposition of the death penalty may be excluded for cause. In Maxwell v. Bishop, 398 U.S. 262 (1970), this Court quoted a lengthy passage from Witherspoon:

> "As we made clear in Witherspoon, 'a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.' 391 U.S., at 522. We reaffirmed that doctrine in Boulden v. Holman, 394 U.S. 478. As we there observed, it cannot be supposed that once such people take their oaths as jurors they will be unable 'to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.' 394 U.S., at 484. 'Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position.' Witherspoon v. Illinois, supra, at 516 n.9." (398 U.S. at 265.)

Thus, a venireman must make it unmistakably clear and must state unambiguously that he would automatically vote against the imposition of capital punishment in order to pass muster under Witherspoon. The rule against exclusion also applies where a venireman equivocates concerning his or her capability to return a verdict of guilty. See Wilson v. Florida, 403 U.S. 947 (1971) (reversing Wilson v. State, 225 So.2d 321 (Fla. 1969); juror's scruples "very well might" affect his verdict; juror states he "would have difficulty" in finding defendants

guilty if the penalty may be death).

Further, the cases make it clear that the improper exclusion of even a single venireman violates the Witherspoon principle. See Davis v. Georgia, 429 U.S. 122 (1976).

In the case at bar, the petitioner contends that the trial Court committed reversible error, based upon the above-cited cases, by excusing a potential female juror who failed to make it unmistakably clear that she would vote automatically against the imposition of capital punishment. In each of her responses to questioning by the Court, she equivocates concerning her capability to impose the death penalty:

> "THE COURT: You could not vote for it. Would you automatically vote against it in any case regardless of the evidence in the case?
>
> MRS. ADDINGTON: I would vote against it. I wouldn't vote for it.
>
> THE COURT: You would vote against it?
>
> MRS. ADDINGTON: Against it. Against it.
>
> THE COURT: In any case?
>
> MRS. ADDINGTON: Well, I'd have to---I'd have to hear the case and all, but just---right now I couldn't be for it.
>
> THE COURT: I didn't hear the first part of your answer.
>
> MRS. ADDINGTON: I said I couldn't---right now I couldn't vote for it.
>
> THE COURT: But before that you said something else and I didn't hear it.
>
> MRS. ADDINGTON: Well, I said I'd have to hear all the evidence, but still I couldn't vote for it.
>
> THE COURT: Are you saying then that under some

circumstances you might be able to vote for it?

MRS. ADDINGTON: No, I don't think so.

[Trial Record, p. 297]
(emphasis supplied)

Her responses to the questioning by the State were equally as ambiguous. First, the excluded juror tells the prosecutor she doesn't "believe" she can impose the death penalty:

"GENERAL KIRKPATRICK: ...Would your opinion concerning capital punishment cause you to automatically vote against imposing the death penalty without regard to any evidence that might be presented at the trial...

MRS. ADDINGTON: No, I don't believe I can."

[Trial Record, p. 295]
(emphasis supplied)

However, after further questioning by both the Court and the prosecutor for the State, the potential juror states she would "vote against it" when asked if she could consider imposition of the death penalty in this case. She was then excused by the Court. [Trial Record, p. 299]

The petitioner contends that a Writ of Certiorari should be granted in this cause based upon the exclusion of the potential juror, as noted above, when such juror did not "unequivocably" and "unambiguously" state her opposition to the death penalty. It is worth expressly pointing out again to this Court that at one time the potential juror stated "Well, I'd have to--I'd have to hear the case and all..." [Trial Record, p. 297]. As stated earlier, the Witherspoon and subsequent line of cases make it clear that a veniremen must state unambiguously that he/she would automatically vote against the imposition of capital punishment.

The defendant's Sixth, Eighth, and Fourteenth